IN THE HIGH COURT OF JUDICATURE AT MADRAS

DATE : 06.07.2007

CORAM:

THE HONOURABLE MR.JUSTICE A.C.ARUMUGAPERUMAL ADITYAN

Crl.A.No.1183 of 2004

Viswan @ Viswanathan .. Appellant/Accused

vs.

State by
The Inspector of Police,
Vellitiruppur Police Station,
Erode District,
(Cr.No.269 of 2002). .. Respondent/Complainant

Prayer:- This appeal has been preferred against the judgment dated 8.12.2003 made in S.C.No.80 of 2003 on the file of the Principal sessions Judge, Erode.

For Appellant :Mr.V.Parthiban (Legal Aid Counsel)
For Respondent :Mr.V.R.Balasubramanian
Additional Public Prosecutor

JUDGMENT

This appeal has been preferred against the judgment in S.C.No.80 of 2003 on the file of the Principal Sessions Judge, Erode. The accused, who has been convicted and sentenced under Section 376 r/w 511 IPC by the learned Sessions Judge, is the appellant herein.

2.The short facts of the prosecution case sans irrelevant particulars are that on 21.2.2002 at about 2.00 pm the accused had made an attempt to rape P.W.2-Krishnaveni, the deaf and dumb girl aged about 13 years.

3.The learned Judicial Magistrate, Bhavani, after taking cognizance of the offence, had issued summons to the accused and on his appearance copies under Section 207 of Cr.P.C., were furnished to the accused and since the offence is triable by a Court of

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Sessions the learned Judicial Magistrate has committed the case to the Principal Sessions Judge, Erode, under Section 209 of Cr.P.C. On appearance of the accused, the learned Sessions Judge has framed charges under Section 376 r/w 511 IPC and also under Section 3(ii) (V) of the SC/St (Prevention of Attracities) Act, and when questioned, the accused pleaded not guilty.

4.On the side of the prosecution P.W.1 to P.W.19 were examined. The eye witnesses to the occurrence are P.W.1 and P.W.4.

5.According to P.W.1, the victim girl viz. P.W.2 and P.W.4 went near the garden belonging to Thulasimani Gounder for the purpose of reaping grass and at about 12.00 noon on the date of occurrence they heard a distress call from P.W.2-Krishnaveni and she (P.W.1) and P.W.4 rushed to the place of occurrence and saw the accused running from the place of occurrence folding his dothi and that when they went near the victim girl, she had informed by using body language that the accused had made an attempt to rape her and that she (P.W.1) could see some lacerated injuries on the neck of the victim girl and later she was taken to the government hospital at Anthiyur from where she was referred to government hospital at Erode and that since the victim girl is a deaf and dumb person, she (P.W.1) preferred Ex.P.1-complaint with the police.

6.P.W.2 is the victim girl, whose evidence was translated with the help of Thiru.Arjunan, a Secondary grade teacher in the deaf and dumb school, R.N.Puthur, Erode. According to the translated version of deposition of P.W.2, in the year 2002 she along with two other ladies went for reaping the grass and at that time the accused came there and pushed her and had torn her jacket and place her half saree's end into her mouth and tried to rape her and that immediately she raised an alarm which brought P.W.1 and P.W.4 nearer to her and that the accused ran away from the place of occurrence after folding his dothi and that she was taken to the hospital were she was treated. She has identified M.O.1 as Saree, M.O.2 as jacket and M.O.3 as inskirt worned by her at the time of occurrence.

7.P.W.3 is the translator Arjunan, who would depose that on 2.2.2002 police took him to P.W.2's house and with the help of him Deputy Superintendent of Police recorded the statement from P.W.2, who is deaf and dumb.

8.P.W.4 is an eye witness to the occurrence, who had accompanied P.W.1 and P.W.2 on the date of occurrence to the place of occurrence for the purpose of reaping grace and at the instigation of P.W.1 after hearing the distress call from P.W.2 she also accompanied P.W.1 to the place of occurrence and saw the accused pushing down P.W.2 on the ground and lying over her and on seeing P.W.1 & P.W.4, the accused ran away from the place of

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occurrence after folding his dothi and that she and P.W.1 brought P.W.2 to the house from where she was taken to the government hospital Anthiyur and later to government hospital Erode.

9.P.W.5 is the VAO of Bargoor Village in whose presence the observation mahazar-Ex.P.2 was prepared by P.W.17, the investigating officer.

10.P.W.6 is the witness in Ex.P.3-recovery mahazar for the recovery of M.O.1 to M.O.3, wearing apperals of P.W.2, the victim girl, recovered by P.W.17.

11.P.W.17, on the basis of the complaint preferred by P.W.2, visited the place of occurrence and also had drawn the rough sketch-Ex.P.22 and since the victim girl belongs to Schedule Caste, he has obtained a certificate for the same from the Special Tahsilhar and altered the charges from section 376 r/w 511 IPC to section 376 r/w 506(ii) IPC and under Section 3(1)(12) & 3(1)(5) of the SC/ST (Prevention of Attrocities) Act. Ex.P.24 is the special report filed by him in this regard.

12.Further investigation was continued by P.W.18, DSP, Crime Branch, Erode District. P.W.18 has arrested the accused and recovered his wearing apparels like M.O.4-lungi, M.O.5-Jatty under Ex.P.4 in the presence of P.W.7. P.W.18 has also recorded the confession statement of the accused in the presence of P.W.7 and has also recorded the statement of P.W.1 with the aid of P.W.3 since P.W.2 is deaf and dumb. He has also examined P.W.11 and recorded his statement and obtained a community certificate from P.W.11 for P.W.2, the victim girl.

13.P.W.8 is the doctor, who had examined P.W.2 on the basis of Ex.P.5 requisition made by the Judicial Magistrate, Bhavani. The Doctor could see two scratch marks on the left cheek of P.W.2 measuring 1 X 5 mm and 1 X 6 mm respectively and also scratch mark on the left side of the neck measuring 1 x 6 mm and she had noticed the pubic hair and armpit hair of the victim girl were found removed. She has deposed to the fact that the hymen of the victim girl was intact and that she is a virgin. The liquid collected from the genitalia of the victim was sent for chemical analysis. Ex.P.7 is the analyst's report, which shows that there is no presence of semen found in the liquid sent for chemical examination. Ex.P.6 is the copy of the accident register. The doctor has further deposed to the fact that she could not see any semen in the genitalia of the victim. The final opinion of P.W.8 is Ex.P.8.

14.P.W.9 is another doctor, who had examined the accused on 31.10.2002 at about 1.20 pm. Ex.P.10 is the potency certificate

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issued by P.W.9 for the accused certifying that he is potent.

15.P.W.10 is the Radiologist, who had examined P.W.2 and gave Ex.P.11-age certificate stating that P.W.2 seems to be above 13 years of age and below 15 years as on 26.10.2002.

16.P.W.11 is the Special Tasildhar, who had issued Ex.P.12-community certificate stating that P.W.2 belongs to Schedule Caste.

17.P.W.12 is the Deputy Tasildhar, who had issued Ex.P.13-community certificate to the accused stating that he belongs to most backward community.

18.P.W.13 is the Sub-Inspector of Police, Vellithirupur Police Station, who had received the intimation from the government hospital Anthiyur at about 8.30 pm on 21.10.2002 about the admission of P.W.2 in the hospital and later P.W.2 was referred from Anthiyur government hospital to Erode government hospital, where P.W.13 visited at about 10.00 pm on the same day and found P.W.2 as a deaf and dumb and examined P.W.1, aunt of P.W.2, and registered the complaint-Ex.P.1 and proceeded to Vellithirupur police station and registered the case under Cr.No.269 of 2002 under Section 376 r/w 511 IPC. Copy of FIR is Ex.P.15.

19.P.W.14 is the then Head Clerk of the Judicial Magistrate Court, Bhavani. He had sent material objects connected with this case for chemical analysis on the basis of the requisition made under Ex.P.16 by P.W.18 with Ex.P.17-letter of requisition of the Judicial Magistrate. Ex.P.18 is the chemical analyst's report.

20.P.W.15 is the doctor, who had examined P.W.2 on 21.10.2002 at about 6.00 pm. P.W.2 was referred to government headquarters hospital Erode, after noting aberrations on her left chest. Ex.P.20 is the copy of the accident register.

21.P.W.16 is the doctor, who had examined P.W.2 at government headquarters hospital Erode on 21.10.2002 at about 10.10 pm. He could find nail marks on both the hips of P.W.2. Ex.P.21 is the copy of the accident register. The doctor has referred P.W.2 for subjecting herself to a medical examination by a lady doctor.

22.After completing the formalities P.W.19, who succeeded P.W.18, had filed the final report on 31.3.2003 against the accused.

23. When incriminating circumstances were put to the accused under Section 313 of Cr.P.C., the accused denied his complicity with the crime. The accused has not examined any witness on his side nor exhibited any documents. After going through the available evidence both oral and documentary, the learned trial

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judge has convicted and sentenced the accused under Section 376 r/w 511 IPC to undergo 7 years RI and a fine of Rs.1,000/- with default sentence, but acquitted the accused from other charges, which necessitated the accused to prefer this appeal.

24.Now the point for determination in this appeal is whether the conviction and sentence against the accused under Section 376 r/w 511 IPC can be sustainable for the reasons stated in the memorandum of appeal?

25.The Point:- Heard Mr.V.Parthiban, Legal Aid Counsel, appearing for the appellant and Mr.V.R.Balasubramanian, Additional Public Prosecutor, and considered their respective submissions.

25(a) According the learned counsel for the appellant, even according to the case of the prosecution as spoken to by the eye witnesses P.W.1 & P.W.4, the offence under Section 354 IPC alone has been made out but the learned trial judge has erroneously convicted the accused under Section 376 r/w 511 IPC. In support of this contention the learned counsel would rely on 1998(2) LW(Crl) 463 (Albert Vs. The State of Tamil Nadu, rep. by Inspector of Polie, Kaliakkavilai, kanyakumari District). The facts of the above cited case is that the accused therein was charged for an offence under Section 341 and 376 IPC stating that on 3.12.1987 at about 5.00 pm at Muvottukonam near Nallayan Church, the accused carried the victim girl aged about 9 years to the nearby room (Pathiriyar Medai) and forcibly committed the offence of rape on her. The learned Assistant Sessions Judge, Kuzhithurai had found the accused guilty under Section 376 IPC and accordingly convicted and sentenced him to undergo rigorous imprisonment for ten years. On appeal before this Court, the learned Judge of this Court has held that an offence under Section 354 IPC alone has been made out and not the offence under Section 376 r/w 511 IPC relying on the judgements of Honourable Apex Court in karnel Singh Vs. State of Madhya pradesh (1995)5 SCC 518, and State of Punjab Vs. Gurmit Singh and others (1996) 2 SCC 384, holding that the corroboration is not necessary for the evidence of prosecutrix in such a type of offence. But the doctor, who had examined the victim girl P.W.1 had found any injury on the person of the victim and on examination of her she found the hymen of the victim intact and there was no mark of violence. Only under such circumstances, basing on the evidence of P.W.5 in that case, a learned Judge of this Court has modified the conviction and sentence of the accused from under Section 376 IPC r/w 511 IPC to one under Section 354 IPC and the sentence was also reduced from 7 years to 1 year with a fine of Rs.1,000/- with default sentence.

25(b) The learned Additional Public Prosecutor relied on the dictum AIR 1998 SC 386 (Manda Lal Vs. State of Jammu and Kashmir), wherein the accused who was convicted under Section 376 IPC r/w 511 IPC and sentenced to undergo rigorous imprisonment for a period of

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5 years and a fine of Rs.2,000/- with default sentence by the High Court of Jammu and Kashmir). The charge against the accused is that the accused who is a headmaster of a middle school attempted to commit rape on Raji (aged 13), a student of the same school. The learned trial judge after trial has held that the charge against the accused under Section 376 r/w 511 IPC has not been proved by the prosecution beyond any reasonable doubt, against which the State preferred an appeal before the High Court of Jammu & Kashmir, which reversed the order of acquittal passed the trial Court and held that the charge against the accused under Section 376 r/w 511 IPC has been proved by the prosecution and accordingly convicted and sentenced the accused to undergo 5 years RI and a fine of Rs.2,000/- with default sentence. The accused preferred an appeal challenging the orders of the High Court before the Honourable Apex Court, wherein it was held by the Honourable Apex Court that from the available evidence it can be held that only an offence under Section 376 r/w 511 IPC has been made out and not under Section 354 IPC. The important observation made by the Honourable Apex Court in the above cited dictum is as follows:-

> "The difference between preparation and an attempt to commit an offence consists chiefly in the greater degree of determination and what is necessary to prove for an offence of an attempt to commit rape has been committed is that that accused has gone beyond the stage of preparation. If an accused strips a girl naked and then making her flat on the ground undresses himself and then forcibly rubs his erected penis on the private part of the girl but fails to penetrate the same into vagina and on such rubbing ejaculates himself then in cannot be said that it was case of merely assault under Section 354 IPC and not an attempt to commit rape under Section 376 read with 511 IPC. In the facts and circumstances of the case the offence of an attempt to commit rape by accused has been clearly established and the accused was rightly convicted under Section 376 r/w 511 IPC."

25(c) Now the point to be decided in this case is whether the accused had made any preparation to commit the offence of rape to warrant conviction under Section 376 r/w 511 IPC. The evidence of P.W.1, P.W.2 & P.W.4 in this regard is note worthy to be mentioned. According to P.W.1, after hearing the distress call of P.W.2, she (P.W.1) and P.W.4 rushed to the place of occurrence and saw the accused running from the place of occurrence folding his dothi. P.W.4 would also corroborate the evidence of P.W.1 in this regard, but she would add that the accused had picked up the dothi and folded and ran away from the place of occurrence. Relying on this piece of evidence the learned Additional Public Prosecutor would contend that the accused had also made a preparation for committing the offence since he was also present at the time when P.W.4 say him. But P.W.2, the victim girl, would depose to the fact that the

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accused had ran away on seeing both P.W.1 and P.W.4 approaching her to the place of occurrence, lifting his dothi. P.W.2 has not stated in her evidence that the accused had picked up the dothi from the ground and then ran away. So it is clear from the evidence of P.W.1 and P.W.2 that he was wearing dothi at the time of occurrence. According to the evidence of P.W.2, the accused had pushed her on the ground, tore her jacket and placed the end of the half saree in her month and made an attempt to rape her. In Ex.P.1-complaint, P.W.1 has stated that at the time when she saw the victim girl the accused was lying on the victim girl and that on seeing both the P.W.1 & P.W.4 the accused ran away by folding his dothi. The prosecution has recovered the wearing apparels of both the accused as well as the victim girl. It is in evidence that there was no stain of semen found either on the wearing apparels of the accused or on the victim. The evidecne of P.W.8, doctor, is to the effect that the hymen of the victim girl was found intact. In Ex.P.1, P.W.1 has stated that she could find some scratch marks on the neck of the victim girl which has also been corroborated by P.W.8.

25(d) In AIR 2004 SC 1497 (Aman Kumar and another vs. State of Haryana), in a case of similar nature, it has been held by the Honoruable Apex Court that if there is no evidence for specific penetration then the accused can be convicted only under Section 354 and not under Section 376 r/w 511 IPC. The relevant observation in the above said dictum runs as follows:-

> "The statute merely requires evidence of penetration, and this may occur with the hymen remaining intact. The actus reus is complete with penetration. It is well settled that the prosecutrix cannot be considered as a accomplice and, therefore, her testimony cannot be equated with that of an accomplice in an offene of rape. In examination of genital organs, state of hymen offers the most reliable clue. While examining the hymen, certain anatomical characteristics should be remembered before assigning any significance to the findings. The shape and the texture of the hymen is variable. This variation, sometimes permits penetration without injury. This is possible because of the peculiar shape of the orifice or increased elasticity. On the other hand, sometimes the hymen may be more firm, less elastic and gets stretched and lacerated earlier. This a relatively less forceful penetration may not give rise to injuries ordinarily possible with a forceful attempt. The anatomical feature with regard to hymen which merits consideration is its anatomical situation. Next to hymen in positive importance, but more than that in frequency, are the injuries on labia majora. These, viz., labia majora are the first to be encountered by the male organ. They are subjected to blunt forceful blows, depending on the vigour and force used by the accused and counteracted

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by the victim. Further, examination of the females for marks of injuries elsewhere on the body forms a very important piece of evidence. To constitute the offence of rape, it is not necessary that there should be complete penetration of the penis with emission of semen and rupture of hymen. Partial penetration within the labia majora of the vulva or pudendum with or without emission of semen is sufficient to constitute the offence of rape as defined in the law. The depth of penetration is immaterial in an offence punishable under Section 376 IPC.

The plea relating to applicability of Section 376 r/w section 511 IPC needs careful consideration. In every crime, there is first, intention to commit, secondly preparation to commit it, thirdly, attempt to commit it. If the third stage, that is, attempt is successful, then the crime is complete. If the attempt fails the crime is not complete, but law punishes the person attempting the act. Section 511 is a general provision dealing with attempts to commit offences not made punishable by other specific sections. It makes punishable all attempts to commit offences punishable with imprisonment and not only those punishable with death. An attempt is made punishable, because every attempt, although it falls short of success, must create alarm, which by itself is an injury, and the moral guilt of the offender is the same as if he had succeeded. Moral guilt must be united to injury in order to justify punishment. As the injury is not as great as if the act had been committed, only half the punishment is awarded.

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An attempt to commit an offence is an act, or a series of acts, which leads inevitably to the commission of the offence, unless something, which the doer of the act neither foresaw nor intended, happens to prevent this. An attempt may be described to be an act done in part execution of a criminal design, amounting to more than mere preparation, but falling short of actual consummation, and, possessing, except for failure to consummate, all the elements of the substantive crime. In other words, an attempt consists in it the intent to commit a crime, falling short of, its actual commission. It may consequently be defined as that which if not prevented would have resulted in the full consummation of the act attempted. The illustrations given in Section 511 clearly shows the legislative intention to make a difference between the cases of a mere preparation and an attempt.

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Though the prosecutrix's version in Court was of rape, when it is compared with the one given during investigation, certain irreconcilable discrepancies are noticed. The evidence regarding actual commission of rape is at variance from what was recorded by police during evidence. The evidence of PW-11, the father who according to prosecution made departure from what he allegedly stated during investigation is to the effect that his wife PW-9 told him that the prosecutrix was teased by the accused persons. Merely because he was termed as a hostile witness his entire evidence does not get effected. Significantly, the evidence of prosecutrix and the doctor does not specifically refer to penetration which is sine qua non for the offence of rape.

There is no material to show that the accused were determined to have sexual intercourse in all events. In the aforesaid background, the offence cannot be said to be an attempt to commit rape to attract culpability under Section 376/511 IPC. But the case is certainly one of indecent assault upon a woman. Essential ingredients of the offence punishable under Section 354 IPC are that the person assaulted must be a woman, and the accused must have used criminal force on her intending thereby to outrage her modesty. What constitutes an outrage the female modesty is nowhere defined. The essence of a woman's modesty is her sex. The culpable intention of the accused is the crux of the matter. The reaction of the woman is very relevant, but its absence is not always decisive. Modesty in this Section is an attribute associated with female human beings as a class. It is virtue which attaches to a female owning to her sex. The act of pulling a woman, removing her dress coupled with the request for sexual intercourse, is such as would be an outrage to the modesty of a woman, and knowledge that modesty is likely to be outraged, is sufficient to constitute the offence without any deliberate intention having such outrage alone for its object. As indicated above, the word 'modesty' is not defined in IPC. The Shorter Oxford Dictionary (third edn.) defines the word 'modesty' in relation to woman as follows:-

"Decorous in manner and conduct: not forward or lower Shame-fast; Scrupulously chaste."

The facts in the above said case will exactly fit in with the facts of the case on hand. In the case hand, the accused, according to P.W.2, had removed her saree and both P.W.1 & P.W.4 have seen the accused running from the place of occurrence folding his dothi. Except the scratches found on the chest and cheek of the victim, there is no other injury found on the person of the victim. It has

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been stated in the cross-examination of P.W.8, doctor, that since the place of occurrence was sugarcane field, there is a possibility of the injury might have been caused by the sharp leaf of the sugarcane.

25(e) Under such circumstances, I am of the view that an offence under Section 354 IPC alone has been made out against the accused and not an offence under Section 376 r/w 511 IPC, as rightly contended by the learned Legal Aid Counsel for the appellant. Point is answered accordingly.

26.In the result, the appeal is allowed in part and the conviction and sentence of the accused in S.C.No.80 of 2003 on the file of the Principal Sessions Judge, Erode, is set aside and the accused is convicted under Section 354 IPC and sentenced to undergo 2 years RI. Set off is ordered under Section 428 of Cr.P.C.

The services rendered by the Legal Aid Counsel Mr.V.Parthiban is recorded with appreciation. His remuneration is fixed at Rs.3,000/- to be paid by the Tamil Nadu State Legal Services Authority, through Member Secretary.

Ssv

Sd/
Asst.Registrar

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Sub Asst.Registrar

To,

1.The Principal Sessions Judge,
Erode.

2.The Public Prosecutor, High Court,
Madras.

3.The Inspector of Police,
Vellitiruppur Police Station,
Erode District,
(Cr.No.269 of 2002)

4.The Superintendent of Central Prison,
Coimbatore.

5. The District Collector, Erode,

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6. The Director General of Police, Chennai

7. The Secretary Tamil Nadu State Legal Service Authority

+ one cc to Mr. V. Parthiban, Advocate sr no. 40654

VRK(CO)
NM(17.07.07)

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